Association of Personal Injury Lawyers

Briefing: Civil Liability Bill – House of Lords report stage – June 2018

About APIL

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation which has worked for almost 30 years to help injured people gain the access to justice they need, and to which they are entitled. We have more than 3,400 members who are committed to supporting the association's aims, and all are signed up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives, paralegals and some academics.

Amendments to remove clauses 2 and 3

APIL supports amendments 18 and 30 in the names of Lord Woolf, Lord Beecham, and Lord Marks of Henley-on-Thames which will remove clauses 2 and 3 from the Civil Liability Bill. We urge peers to vote in favour of them.

Upon taking office, the Lord Chancellor has to swear an oath in which he says he will "defend the independence of the judiciary"[1]. These clauses in the Civil Liability Bill seriously undermine that oath. Instead of defending the independence of the judiciary, the Lord Chancellor is sending a clear message to the judiciary that he no longer trusts its ability to decide fairly what is due in compensation to injured people. The judge will have his hands tied by a tariff of compensation imposed by the Government. Instead of being able to decide an amount of compensation based on legal precedent, and years of experience and legal training, the judge's role is relegated simply to awarding an amount from an arbitrary tariff.

It is quite a feat for the Government to introduce a Bill which undermines judicial independence, as well as attacking the rights of injured people. Those who have been injured through no fault of their own will take the biggest hit to their rights in recent memory. Any concept of fairness or compassion or help for genuinely injured people has been sacrificed in what the Government has openly called 'a Bill to cut insurance premiums".

[1] Section 17, Constitutional Reform Act 2005

The payment of fair damages for pain and suffering is an important acknowledgement that the injury inflicted was needless. It can help to atone for the negligence which caused the injury, and it holds the wrongdoer to account. The most devastating aspect of any car crash is not damage to the vehicle, but personal injury and the very purpose of insurance is to provide recompense for that.

A similar injury can produce very different effects on, for example, a young mother nursing a baby, a professional fitness instructor, or someone who suffers a complete loss of confidence as a result of the injury and the incident that caused it. This is more likely to apply to those who are already vulnerable, such as elderly people. To remove judicial discretion from awards will inevitably lead to under-compensation in many circumstances. Tariffs are appropriate for mobile phone contracts and taxi fares, not injured people.

In the Government's response to the House of Lords Delegated Powers and Regulatory Reform Committee, Lord Keen attempted to defend the Government's decision to introduce a tariff. According to Lord Keen, a tariff is "consistent with other areas where the Government already controls and sets the rates of damages"[2]. Lord Keen cited the Criminal Injuries Compensation Scheme (CICS) as an example. It is an irrelevant comparison. The CICS is administrated by the Criminal Injuries Compensation Authority, an executive agency of the Ministry of Justice, and is funded solely by the taxpayer. The Government, therefore, has a duty to the taxpayer. The Government does not, and should not, have a duty to protect the profits of private companies, and introduce tariffs which will protect negligent people from paying full and fair compensation. There is no precedent for this.

These amendments will protect the independence of the judiciary and defend the rights of injured people. In the long-running debate on this issue, there appears to be little recognition about the needs of injured people. Instead of doing what is right for injured people, whether they have minor or life-changing injuries, ministers continue to see injured people as an easy target.

Members of the House of Lords should support amendments 18 and 30 to remove clauses 2 and 3 from the Bill. Rights for injured people, and an independent judiciary, are hallmarks of a civilised society, and should be protected.

[2] https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/152/15204.htm

Definition of whiplash – Government amendments

The Government has tabled amendment 1 which would place a definition of a whiplash injury on the face of the Bill. In the Government's response to the House of Lords Delegated Powers and Regulatory Reform Committee, Lord Keen said the Government had "consulted with and obtained invaluable guidance from a group of expert stakeholders, including experienced medical practitioners and both claimant and defendant solicitors"[3]. Lord Keen has not said, however, if the whiplash definition proposed has been agreed by this "group of expert stakeholders".

APIL has argued consistently that the definition of whiplash should be set by medical experts. It should not be a policy decision agreed by a mixed stakeholder group, but by medical specialists based on training and experience. Any mistake in the definition could have very serious consequences, and risks including people with injuries far more serious than those traditionally classed as whiplash. This can surely never have been the Government's intention.

For example, under the proposed definition, these injuries could include a tear of the rotator cuff, which is a group of muscles and tendons in the shoulder. This is a serious debilitating injury. Unlike an injury traditionally associated as whiplash, a tear of the rotator cuff is not a self-resolving injury, and it would generally involve the injured person requiring surgery. This is not a whiplash injury. There will be many more injuries which are not whiplash injuries, but which will be caught by this proposed definition.

Alongside the proposed definition, the Government has tabled amendment 4 which allows the Lord Chancellor to amend the definition of "whiplash injury" in the Bill. As part of this process, the new clause requires the Lord Chancellor to consult various people and organisations. These include the Lord Chief Justice, the Chief Medical Officer of the Department of Health and Social Care, and the Chief Medical Officer for Wales. Some of these people are the ones who should be setting the definition in the first place. This consultation, however, will only take place after the Lord Chancellor has reviewed the definition and come to a decision as to whether it should be changed. This 'consultation' would be little more than a tick-box exercise.

The Lord Chancellor is not a medical expert, and he should have no role in drafting a medical definition. Medical experts alone should decide the definition from the outset, and it should only be medical experts who can recommend any future change in the definition.

[3] https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/152/15204.htm

A tariff for damages

APIL is fundamentally opposed to the introduction of a tariff for damages for the reasons explained above in our comments in support of the amendments in the name of Lord Woolf, Lord Beecham and Lord Marks of Henley-on-Thames.

If there is to be a tariff, however, it should be decided by the independent judiciary, such as the Lord Chief Justice, as proposed by Lord Judge, Lord Hope of Craighead, Lord Mackay of Clashfern and Lord Pannick in amendment 12. It should certainly reflect the Judicial College guidelines.

The Government has tabled amendment 19 which would require the Lord Chancellor to carry out regular reviews of the regulations made under clause 2. It is astonishing that the Lord Chancellor would not be required to consult with stakeholders as part of the review. It is inconsistent that the Lord Chancellor must consult the Lord Chief Justice, among others, on the definition of whiplash, but not on the level of appropriate compensation.

Uplift for damages

Amendment 25 tabled by the Government creates yet more hoops through which injured people must jump. The legislation already places unprecedent restrictions on injured people, but the Government seems determined to create more obstacles for people who have already suffered needlessly because of someone's negligence.

Clause 3 allows a judge to depart from the tariff amount when compensation is decided, but once again the role of the judge is restricted. A judge is only allowed to award an uplift of compensation to a maximum of 20 per cent. Under this amendment, the judge will only be allowed to award an uplift if the whiplash injury is "exceptionally severe". It is not clear what "exceptionally severe" means. Does it mean severe in terms of the injury? The effect on the individual's life? The effect on the individual's family? This amendment does nothing but add confusion, create barriers for injured people, and will lead to costly and time-consuming satellite litigation to determine what it means.

Amendment 73 – Personal injury discount rate

The basis of the Government's legislation is that claimants should invest in 'low risk' rather than 'very low risk' investments. According to the Bill, the Lord Chancellor must make an assumption that the relevant damages are invested using an approach which involves, "more risk than a very low level of risk, but less risk than would ordinarily be accepted by a prudent and properly advised individual investor who has different financial aim".

The proposal by the Government to move from 'very low risk', which is how the discount rate is calculated currently, to 'low risk' is inherently unfair for claimants. There is a world of difference between 'low risk' and 'very low risk' for an injured person. 'Very low risk' investment reflects the House of Lords decision in *Wells v Wells*[4] that injured people should not have to gamble their compensation. The discount rate should, therefore, be set according to the return on index-linked government stock (ILGS). While, effectively, this means a risk-free investment, nothing is ever completely risk-free, hence the term 'very low risk'. It is fairness to injured people which has to take precedence here. We are unsure as to the effect of amendment 73 tabled by Baroness Bowles of Berkhamsted, but it will not maintain the fairness which exists under the current law.

In the kind of catastrophic injuries which trigger the use of the discount rate (often referred to as the 'Ogden rate') injured people can face substantial financial losses: loss of earnings for example, the cost of round-the-clock medical care, and social care and support. They may need professional help with washing, dressing, getting up and about, getting proper exercise. They may need help with social activities or may need to have their meals made. This is in addition to the need for specialist equipment to help them manage their disabilities. It is important to recognise that the people who are affected are those who have sustained catastrophic, life-changing injuries at the hands of other people – and that those responsible have been proven to be negligent.

Injured people are not stockbrokers. The first thought of someone who receives compensation following a catastrophic, life-changing injury is not "how can I make the most of this fantastic windfall?". It is instead "how can I eke out my compensation payment to make sure it lasts long enough to look after me and my family for the rest of my life?" or "will my compensation payment keep pace with inflation in the long term?".

Injured people need a fair system which recognises the fact that people with life-changing injuries should not have to gamble with the compensation which is carefully calculated to last for the rest of their lives. The fact that many people are so risk averse that their compensation investments may not even keep up with inflation is often overlooked.

They are right to be risk averse. The compensation they are given is all they will ever have. When undercompensated, they survive – rather than live – in fear of what will happen when the money runs out and cannot see a way forward.

[4] Wells v Wells (Thomas v Brighton Health Authority, Page v Sheerness Steel Co, Wells v Wells) [1998] UKHL 27

Our members have reported that injured people are often so concerned about having to eke out their compensation for the rest of their lives that they have gone without the therapies they need, or relied on the charity of their families.

Damages must, therefore, be calculated on the assumption of very low risk investments and the system should be reviewed on a regular basis. This is an issue of need: the actual concrete needs of people who have been injured through negligence must be met in a fair and just 21st century society.

There has been much concern raised about the effect of the change in the discount rate on the NHS. After the Lord Chancellor announced the change in the rate in February 2017, the Chancellor of the Exchequer, in the Spring Budget, announced that the Government had set aside £5.9 billion to "protect the NHS"[5]. While this is clearly a cause for concern, it is critical to recognise that this increased cost to the NHS is not because of how the discount rate was set, but because the discount rate had been out of date and incorrect for many years.

The long overdue correction of the discount rate was the first change in the rate in 16 years. Changing the rate after such a long period was bound to come as a shock to those who have to pay compensation, and it is inevitable that there would be financial consequences.

The only way to mitigate the financial effect of a change in the discount rate is to have regular reviews of the rate, and the Bill provides for this. Regular reviews will ensure any changes should have less financial impact on organisations such as the NHS.

When considering what financial effect any compensation payment has on the NHS, it must be remembered that NHS Resolution is only liable to pay compensation when the NHS has injured a patient through negligence. The problem arises when the discount rate is too high and will therefore fail to meet the needs of injured people. The money will run out before the end of his life. He will then be forced to fall back on the State – and the NHS.

So, if the discount rate is set too high the NHS will not only have to pay for its own negligence, but also the negligence of everyone else who caused needless catastrophic injury.

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[5] https://www.gov.uk/government/speeches/spring-budget-2017-philip-hammonds-speech